92-1853

NO._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LITHO RANGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WASHINGTON, D.C. 20543

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 350, Courthouse Square Bldg.
310 Lakeside Avenue N.W.
Cleveland, Ohio 44113
(216) 523-1100

EDITOR'S NOTE

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QUESTIONS PRESENTED

I

Whether due process is denied an accused when the Court, without any expressed evaluation of the various alternative methods of qualifying evidence proffered under favor of Rule 801(d)(2)(E), rotely opts to preliminarily admit such proof pending a ruling as to admissibility at the close of the government's case.

II

Whether due process was denied when the Court admitted considerable hearsay evidence, which evidence did not satisfy the conditions precedent to admission required by Rule 801(d)(2)(E).

III

Whether due process was denied when the trial Judge refused to instruct the jury that evidence admitted under favor of Rule 801(d)(2)(E), could not be regarded as substantive proof of the petitioner's guilt of the conspiracy charge.

IV

Was the petitioner denied the right of confrontation when his counsel was denied the right to make effective use of the contents of a Motion to

Suppress the confession made by one of the government's chief witnesses, which contents would have tended to impeach the testimony of several government witnesses?

V

Was the evidence insufficient to support the defendant's conviction for the charged conspiracy (21 U.S.C. §846)?

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Litho Range, respectfully prays that a Writ

of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals, which judgment became final on February 18, 1993 (see Appendix "A," at p. A-1) when a Petition for Rehearing *En Banc* (Appendix "B") was denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth at Appendix "C", in the Appendix to this Petition, at p. A-24.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals was entered in the case of **United States v. Litho Range** on *December 23, 1992.* A Petition for Rehearing *en banc* was denied on *February 18, 1993.* The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES:

1. Fourteenth Amendment, United

States Constitution.

2. Fifth Amendment, U.S. Constitution.

3. Sixth Amendment, U.S. Constitution.

4. 21 U.S.C., §841[a] & [b].

5. 21 U.S.C., §846.

6. Rule 29, Federal Rules of Criminal Procedure.

7. Rule 104, Federal Rules of Evidence.

8. Rule 801(d)(2)(E), Federal Rules of Evidence.

STATEMENT OF THE CASE

I

Litho Range, the petitioner herein, and several others (including Eugene Ellington, a co-defendant at the trial and Jay Jackson, who became a witness) were charged in a thirteen (13) count indictment with various charges, including Drug Conspiracy (21 U.S.C., §846), Substantive Drug Offenses (21 U.S.C., §841[a] & [b]), and Money Laundering (18 U.S.C., §1956). Of

the five charges made against Litho Range in Counts 1, 2, 8, 12 and 13, he was only convicted of the Conspiracy charge in Count 1. Specifically Range was acquitted of the substantive drug offenses charged in counts 2 and 8, and of the money laundering charges made in counts 12 and 13 -- asserted violations of 18 U.S.C., §1956 (a)(1)(B)(i). The government's chief witness was one **Walter Grosser**, a paid government informant. In putting Grosser's testimony in its proper perspective, **DEA Agent Moritz**, readily testified Grosser had originally come to the Government and indicated he could "be of assistance to the Government" (Tr., 306). Additionally, he testified that while there were times when Grosser was not under surveillance when he entered Ellington's house, they would always have Grosser's vehicle, which would be "in front of the house[,] under surveillance" (id., 316).

Even more importantly, Grosser never had a conversation with Range that was recorded (id., 318 & 320). As to this, not surprisingly, since Moritz is a federal agent, he was unwilling to

concede even the obvious fact that the lack of a recording gave Grosser more leeway than would have been the case if the asserted conversations had been recorded (id., 318-319). Agent Moritz also made the critical concession here that "when the charges [in this case] were made against Mr. Range, they were made without the benefit of any contribution by Mr. Jackson"[1] (id., 325). This follows because, as the Record here shows, Jackson's evidence was not purchased by the Government until after he was arrested.

Back to Walter Grosser. Significant here, Grosser admitted he aggressively sought to cultivate a relationship with Ellington for the sole purpose of gaining his confidence in hopes he (Grosser) "could make a purchase from Litho Range" (Tr., 584). Indeed, Grosser likewise admitted he had, for purely mercenarious reasons, openly solicited the government to endorse this effort so that he could reap a personal profit from this venture (id., 511-

---

[1] Jay Jackson was one of the defendants in this indictment. Following the consummation of a plea bargain, Jackson, who was Ellington's nephew, testified for the government.

512).

Grosser also rather brazenly admitted that during his conversations with Ellington he "threw out ... a lot of people's names" (id., 512). His repeated use of the word Mafia (id., 513), he testified, was done intentionally so as to give Ellington the "impression" (ibid) that the people he was associated with "were heavy people" and that "they hurt people" (ibid).

Also, with reference to some of the contrived comments in the taped conversations that were played for the jury and with reference to other segments of Grosser's crafted testimony, the fact that he had purposefully introduced these names into many of these conversations (id., 516 & 519-520)[2] is a matter that surely must be reckoned with. In some of these instances Grosser stated his

---

[2] Agent Moritz had earlier brazenly testified to this precise point. Indeed he agreed to having orchestrated the things Grosser was suppose to work into his conversations with Ellington and others. The effect of this effort is that in its wake Grosser literally interrogated Ellington in quest of information that could incriminate Range. Stated another way, Ellington was actually transformed, albeit unwittingly, into a witness against Litho Range.

purpose was to try to verify things he had been told by other people.

Of no mean significance to the contentions urged below (--that is, that the "in furtherance" aspect of 801[d][2][E] was not satisfied before the formal admission of various taped conversations that contained conversational references to Litho Range) was Grosser's compelling testimony "that the Government would prime ... [him] on topics that ... [he was told to] steer the conversation to include" (id., 523). To this end, the Government actually gave him certain names to throw "into these various conversations" he fully intended to have with Ellington (id., 523). Most important here, Grosser actually boasted he was fully aware of "what was essential in the successful prosecution of a case" (id., 534).

On this point, the following segments of Walter Grosser's testimony is worth emphasizing:

> **Q.** So you tailored all your actions in a way to be of maximum assistance to

the government?

A. That's correct.

* * *

Q. Okay. Well, you do agree that a lot of the things that you testified involving Mr. Range occurred during times when you were not wearing a tape, I mean a microphone, a broadcast device; right?

A. Yes, that's correct.

* * *

Q. But when you testified that something happened and something was said during the conversation and there's no tape, the only proof that the government has to offer that occurred is your credibility.

A. Yeah, I guess you could say that.

* * *

Q. Right. And in order to decide that, we -- you understand, well, we need to know something about you because by your own admission you sell yourself to people as a person that you're really not; correct?

A. I've done that. Yes, I have.

Q. So we have to decide whether or not you're trying to sell the jury a bill of goods, don't we?

A. In your capacity, I guess you do.

(Tr. pp. 534-536.) (Emphasis supplied.)

Grosser also testified that Ellington -- not unlike himself, was "a name dropper" (id., 533) and that he "dropped Mr. Range's name quite a bit" (id., 533). To be sure, some of Ellington's references to Range were indisputably gratuitous. Others were, simply put, cleverly elicited from him. This is particularly so with reference to Ellington's statement that "he owed Mr. Range 185 or 180 some-odd thousand dollars...." (id., 533). As to this, Grosser conceded the ultimate point: Range never told him Ellington owed him any money (id., 534).

The position thus being urged is solidified by Grosser's clear-cut testimony that while he assertedly saw Range on Dibble Avenue on "at least three occasions" (id., 540), there were no

tapes made for "any [of the] time[s] when he [i.e., Range] was present" on the premises (id., 540). Even this is not all, by way of contrast with Grosser's earlier testimony (that when he would wear these wires, those working with him would be in the area [id., 542-544]) it is most significant that on none of the occasions when he asserts Range was supposedly on the premises, were any of the agents "in the area surveilling the house and the people coming and going" (id., 541). The upshot of this was, as Walter Grosser agreed, "the only proof we have [he] even saw Range there ... [was his] own testimony" (id., 541). Further, he conceded that being a salesman, he understood what "puffing" meant. Amplifying this thought Grosser testified:

> **Q.** ... [I]n other words, if you're going to sell me a car, a low-grade car, [and] you convince me it's better than a Mercedes or Lexus, that's puffing?
>
> **A.** Yes.

* * *

Q. If he [Ellington] tells you that Litho Range owes him 250,000 or 150,000, you don't know if he was puffing?

A. No, I don't.

* * *

Q. In your business, you testified here you traded on other people's names. You mentioned Virgil, something about "KB," or Kenneth Bradley, or to suggest you knew him. You were kind of trading on his name to add prestige to your reputation; is that right?

A. Right.

Q. How do you know when Genie Ellington was using the name Litho Range he wasn't trying to add prestige to his conversations and whatever it was he was doing? You don't know that, do you, of your own knowledge?

A. I can't prove it.

* * *

Q. Now, did the government tell you to insert into your conversations with

Ellington when you were riding around looking for Mr. Jackson that Litho Range wanted him killed and that Litho Range was a killer, or something to that effect? You recall constantly throwing his name in connection with violence in that conversation? You remember that, don't you?

A. I remember doing that, saying that, yeah. But it wasn't the government that had asked me to do that; it was from the previous conversation the day before.

Q. That was unrecorded?

A. That was unrecorded, right. I was trying to get it on the ... recorder.

Q. Now, ... it's true that ... invariably when Range's name would come into a conversation, you were milking it out of Genie?

A. Not all the time.

* * *

Q. Okay. But once the name Litho Range hits into the mix, then you were constantly trying to pick him?

A. Yes, that's true. Tr., 548-550. (Emphasis supplied.)

II

Some of the various statements inappropriately and improperly regarded by the Court (Tr., 916-918), as having been made in furtherance of the charged conspiracy, are included in the following selected segments of *Walter Grosser's* testimony:

(1) Ellington "told me that Litho was his partner and he was the one that was supplying him heroin that he sells. And he also stated that Litho had a bar on St. Clair, and a dry cleaners, and he said that he owed Litho $254,000, I believe it was". Tr., p. 416.

(2) On July 6, according to Grosser, Ellington told some unknown person that "he [Ellington] owes Litho $215,000 ... [s]o the guy had to give him his money ... Eugene Ellington told [him, i.e., Grosser, the witness] that Litho was going to bring a shipment of heroin that day." Id., 429.

(3) On July 22, Grosser testified he was again at Ellington's house and on this occasion "we talked about Litho selling cocaine, too. Id., 436.

(4) On August 19, Grosser says he was at Ellington's house. And that Ellington told him "Litho Range comes over every day and he picks up between 4

and $6,000. And this particular day he only had only $4,000 to give him." Id., 438.

(5) On October 10th (id., 452), Grosser testified, Ellington "was counting out his money that he was going to give Litho" (id., 453). Litho he says, then came to the house and Ellington and Range left his presence. When Ellington returned 15 minutes or so later, Grosser credited him with saying "Litho was mad because ... he [Ellington] had him out there digging (id., 454). According to Grosser, he had helped Ellington dig in the yard for what was supposed to be a search for some drugs that had been buried somewhere in the yard. Id., 453-454.

(6) On October 20, Grosser testified Ellington "told him that Litho had told him [Ellington] not to do such a big deal [i.e., the $100,000 transaction Grosser had talked to Ellington about], because only the police has that kind of money ..." Id., 465-466.

(7) In Exhibit No. 107 the taped conversation of July 13, 1971 (Tr., 434) the statement was made by Grosser to Ellington that a man named Virgil was telling him "that Litho was getting his stuff [i.e., drugs] from Butch before ... [Butch] got busted."

Following Ellington's denial that this was so, Ellington on this same tape added that "me and Litho went to Po Butch and told him the Feds was trying to get me [i.e., Ellington] to bust him." (ibid).

To this Ellington added the further comment that:

"me and Litho went to Po Butch, and he tried to give us some money. Litho says he don't want no money, he's just letting ... [him] know" (ibid).

(8) In Exhibit No. 109, a taped conversation of Grosser is heard saying Ellington: "Jay [Jackson] didn't given Litho all your money did he?" This statement came out of the blue and was not in response to anything said by Ellington and was totally ignored by Ellington (ibid). This was later followed up by Ellington's remarks heard on the tape: (a) "you think I'm lying, I owe that man [referring to Range], $182,000 ..." (ibid). And (b) "I'll sell this shit ... myself cause I owe the dude $182,000's man." Id., 442-444.

(9) In Exhibit No. 140, another taped conversation, Grosser (after being told by Ellington that "Litho" was "leery of Buddy" and believed that "Buddy was up with" the drug theft by Jackson) volunteered the egregious statement that if that were true "he wouldn't be here." This gross observation he punctuated by saying "if Litho kills you man [i.e., Ellington]" he would "talk to Jay" himself. Id., 462-463.

(10) Next, on this same tape, Grosser embellished his naked idea that Range was a killer by generating an egregious response from Ellington. This he did by asking: "what Litho thought, that Buddy would be in on it too." And, by asking Ellington if he thought Ellington had actually "killed [Jay] Jackson who was at the time missing." Ibid.

Again the critical ruling made by the trial court with reference to our hearsay and confrontation objections to this evidence was that this evidence was admissible under **Bourjaily**. As the trial Court put it, there was a conspiracy here and these statements were made in furtherance of the conspiracy (Tr., p. 916-918.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

A central point behind all of the above selected segments of the Record is well made even if we assume Jay Jackson's earlier testimony (**Jay Jackson,** at Tr., 33-34 and 37-38) sufficiently satisfied "the evidentiary standard" for the admission of 801(d)(2)(E) evidence. This would only be the beginning rather than the end of the required process. This follows because (as argued below) the naked proof of the existence of a foundation conspiracy surely would not authorize the blanket admission of every statement made to Ellington by Grosser and every response made by Ellington that may have occurred "during the course" of

such conspiracy. And, this without regard to whether it furthered the conspiracy or not. This tenet as well was violated.

Now we are willing to concede that more probable than not all of the statements isolated above were admissible against Ellington. However, as against Range they could only be admitted if there was substantial evidence of the charged conspiratorial relationship between the non-testifying declarant (here, Ellington) and Litho Range, who was devastated by the statements. Additionally, to be admissible the statement must also have been made in furtherance of such conspiracy.

We will grant also that the Court's prerogative may have allowed him to fully consider the statements themselves in determining whether they were probative of the existence of a conspiracy. But the right given the Judge to so consider such evidence, in determining admissibility, is hardly an indication that all statements made by the declarant are automatically rendered admissible as proof of guilt of the charged conspiracy. The

obvious reason this is so is because, as contended above, 801(d)(2)(E) only requires a preponderance of the evidence. To prove guilt requires evidence that reaches a higher standard.

Postured by the various cogent analyses made below (in Arguments No. I, II & III), any doubt as to whether Litho Range was truly victimized, both, by the admission and the jury's unrestricted use of evidence admitted under Rule 801(d)(2)(E) is obviously beyond dispute. Even this wrong was magnified when the trial Judge refused to limit the proffered evidence to a proper purpose. This fact is very readily gleaned from the following segments of the government's summation. Here counsel-opposite argued:

> Real good proof that Litho Range is the supplier comes from Litho Range's customer, Eugene Ellington, who, while he's being tape recorded on July 13th when he's selling dope, says that, yes, Litho is a supplier. That tape went as follows: Walter said -- he made a quote of another doper -- he said, oh, yeah, I heard that Litho got his stuff from Butch.

And Genie says, no, no, please, man. He says, no, Butch owes Litho so much money it ain't even funny.

* * *

On September 25th, Walter Grosser says to Genie ... did Jay give all your money to Litho? And Eugene Ellington tells you no. He says, I owe that man $182,000, his supplier.

On October 11th, Gene Ellington calls Walter. He's talking to him. He says, I was talking to Litho last night about you, man. Now, if you weren't engaged in the heroin business together, why would you be discussing the trustworthiness of one of your customers?

And what you learn is that Litho Range told Genie Ellington they felt Walter Grosser was a snitch working for the federal government.

But Gene Ellington didn't believe that, no, he got Walter out there for a whole day digging. And you hear on the tape that he confirms what Walter said, they were out there digging looking for this heroin that they thought Jay Jackson had stolen.

> And Gene Ellington says, I told Litho, he cool like a MF shit, you know. But Litho is still leery of Walter and that's why we don't have tape recordings of Litho Range's voice because Litho Range is a much more cautious man than Eugene Ellington.
>
> You hear Walter Grosser speculating, he says, talking about Jay Jackson, he says, why did you steal all that man, it was in two Gator Aid bottles?
>
> No, he says, it ain't glass. It's in two coffee cream jars.... Id., 36-38. (Emphasis supplied.)

Obviously, any argument that the jury regarded the content of these various comments made by (as well as those merely attributed to) Ellington, Jackson and Grosser as anything other than substantive proof of Litho Range's guilt would not only be farfetched, it would also be glaringly specious.

Also, an argument can be made that the wrong done Range by the admission against him of these various incriminating statements, most of which were cleverly and intentionally elicited

by Grosser from Ellington, can be analogized to a **Bruton v. United States, 391 U.S. 123 (1968)** violation. For if **Bruton** stands for anything it is that a confrontation violation occurs when a non-testifying co-defendant's statement, which incriminates or inculpates an accused, is admitted into evidence in a joint trial. Clearly, these various statements and comments made by, and attributed to, Ellington must be regarded as being extremely inculpatory. This is so because they not only incriminated Range, but also because the Government wilfully intended that the statements elicited from Ellington should be fairly understood as incriminating Range. This makes the lack of an opportunity to cross-examine Ellington, as to these conspicuously prejudicial statements, an undeniable due process violation.

On the proof beyond a reasonable doubt issue, we start with the fact that the most critical evidence involving Litho Range that can be said to bear even slightly thereon would be the various statements supposedly made by Eugene Ellington in conversations

with the informant, Walter Grosser, about Litho Range.

Apart from the serious credibility problems one naturally has with Jay Jackson's worth as a person and as a credible witness, his proof at best would only show a buyer-seller relationship between Eugene Ellington and Litho Range. And, it could not be clearer that such a relationship would simply not be conspiratorial. See **Direct Sales Co. v. United States, 319 U.S. 703, 709, 711-712 and n. 8 (1943)**. Indeed this very point was well made in **United States v. Jerome, 924 F.2d 170 (9th Cir. 1991)**, where the Court ruled, in the context of a CCE (21 U.S.C., §848) prosecution, that a supplier is not properly regarded, by virtue of that fact alone, as being a part of his customer's business.

(I) Due Process Is Denied An Accused When The Court, Without Any Expressed Evaluation Of The Various Alternative Methods Of Qualifying Evidence Proffered Under Favor Of Rule 801(d)(2)(E), Rotely Opts To Preliminarily Admit

Such Proof Pending A Ruling As To Admissibility At The Close Of The Government's Case.

Granted, the trial Court must be regarded as having the prerogative of admitting some of the assailed evidence "subject to a later demonstration of ... [its] admissibility by a preponderance of the evidence", **United States v. Vinson, 606 F.2d 149 (6th Cir. 1979)**. Here it should be noted that once the Court admits the evidence preliminarily, the odds against the Court later finding a failure to justify its ultimate admission is so overwhelming as to be impossible. This is so because the Court must be credited with being aware that any ruling against admission would almost surely require a mistrial for the beneficiary of the ruling.

Simply put, the reservation until the close of the government's case of a ruling on the existence of the conspiracy predicate for admission (required by 801[d][2][E]), invariably and necessarily, negatively influences the favorable consideration the Court might otherwise give to the "in furtherance" aspect and

during the course of requirements of Rule 801(d)(2)(E).

Another point we are here contending for is that even if one assumes a conspiratorial relationship was established as between Ellington and Range, this finding simply would not automatically qualify the admission of any and all statements shown to have been made, or said to have been made, by Ellington in conversations actually had (and assertedly had) with the hired-witness Grosser. Because the petitioner Range's "substantial rights" were perforce adversely affected by the conditional admissibility method used to determine admissibility, a due process issue surfaces.

Here it should be understood we only listed above some of the various statements assertedly made by Ellington to Grosser that were admitted as proof of the conspiratorial relationship required by Rule 801(d)(2)(E). It is, of course, undeniable that these hearsay statements and others were considered by the jury as substantive proof of guilt (id., 801[C]). As to the admission of these statements it is our considered position that there is literally

no way it can be said that any of these statements (particularly those that were the product of Grosser's instigation and stimulation) can be defended as being anything other than a rank violation of Range's confrontation rights.

(II) Due Process Is Denied When The Court Admits Considerable Hearsay Evidence, Which Evidence Did Not Satisfy The Conditions Precedent To Admission Required By Rule 801 (d)(2)(E).

Granted the trial Court does have considerable discretion with reference to the order of proof regarding the admission of evidence under favor of **Rule 801(d)(2)(E), Federal Rules of Evidence**. However, this surely does not mean that in all cases only one alternative should invariably be used. Nor does it mean that it is not even possible that a valid argument could be made to the effect that the trial Court should have used a different method and that his failure to do so prejudiced the accused.

Now we fully agree that **Bourjaily v. United States, 107**

S.Ct. 2775 at 2783 (1987), did tend to indicate that a Court may allow hearsay to justify its own admission. However, as was argued to the District Court this Court left open the question presented here, i.e., whether the determination required by Rules 104 and 801(d)(2)(E) could be made solely on the basis of what would otherwise be purely hearsay evidence (ibid).

(A) Various statements made by an asserted co-conspirator and Ellington, those that were tape recorded (and played for the jury) and those that were simply testified to by the witnesses Grosser and Jackson, were not properly admitted against the petitioner.

At the outset we recognize, as we are sure the Court will, that the co-conspirator exception to the hearsay rule, although not actually an exception because of the wording in Rule 801(d)(2)(E), relates to issues that are distinct from the crime of conspiracy. Granted, under the co-conspirator evidence rule (i.e., 801 [d] [2][E]), particularly when considered in the light of **Bourjaily**, a trial court may consider the statements seeking admission themselves as well as independent evidence in determining

admissibility. Id., 185, 2783.

However, and this point seems clearly to have been ignored here, **Bourjaily** left open a critical question present in this case. Simply put, that question is: whether a trial court can make the required determination solely on the basis of what would otherwise be inadmissible hearsay. See **Bourjaily, 107 S.Ct. at 2782**. Also, **Bourjaily** simply did not eliminate the requirement that the conspiracy required by 801(d)(2)(E) must still be shown by a preponderance of the evidence to exist.

In **United States v. Mack, 837 F.2d 254 (6th Cir. 1988)**, it should be noted that the Court below made the very critical point, relying on **Bourjaily**, that there is still a requirement that the government must prove "by a preponderance of the evidence that a conspiracy exists" before admitting such proof. **Mack, 837 F.2d, at 258**. The Tenth Circuit, in **United States v. Pinto, 838 F.2d 426 (10th Cir. 1988)**, and the Seventh Circuit in **United States v. Pitts, 840 F.2d 368, 371 (7th Cir. 1987)** likewise

credited the fact that the admissibility of statements under favor of Rule 801(d)(2)(E) is dependent upon proof (by a preponderance of the evidence) that the defendant and the declarant were members of the same conspiracy. And, admissibility is also dependent upon equally cogent proof that the statements were actually made in furtherance thereof. Id., 433.

Based on these insuperable tenets, we fully contend the admission of the assailed evidence[3] cannot be squared with the precise holding made in **Bourjaily**, that the trial Court "*must be satisfied that the statement actually falls within the definition of the rule*. There must be evidence that there was a conspiracy involving the declarant and the non-offering party, and that the statement was made 'in the course and in furtherance of the conspiracy.'" *Id., 1278.* (Emphasis supplied.)

Whether the Government's proof satisfied the condition for

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[3] Our reference here is to the statements listed above, pp. 7 to 12 of this Petition.

admission required by Rule 801(d)(2)(E) was a question of law and as such was subject to *de novo* appellate review. With this as the standard, there was no reason for the Sixth Circuit to defer as it did to the ruling made by the trial Court admitting the taped, and other, Grosser-Ellington conversations in their entirety. See **United States v. Silverman, 861 F.2d 571, 576-577 (9th Cir. 1988).** This cogent point, in our judgment, was made most clear in **Bourjaily**. Our reference here is to this Court's statement that 801 (d)(2)(E) statements must be regarded as being presumptively unreliable. **Bourjaily, 107 S. Ct. at 2781.**

(B) The "in furtherance" requirement of Rule 801(d)(2)(E) is not met by proof of idle chatter and the like.

Clearly among the various problems surfacing here, and that must be specifically addressed, is the issue as to whether a 801(d)(2)(E) conspiracy had been shown by a "preponderance of the evidence" to exist as between Range and Ellington, as is required. And, assuming it can be said such a conspiracy was

shown, the issue then is whether the statements made by Ellington were in fact made "in furtherance" thereof as the Rule likewise requires.

On the other hand, with reference to the hearsay statements themselves, which were admitted over objections as proof of the matters asserted (Rule 801[C]), the most that can be said for these various statements is that they are more easily viewed as casual comments and narrative descriptions (by Ellington). None of them could possibly further any of the conspiratorial objectives alleged in the indictment. Additionally, these statements, which more often than not were the result of clever interrogation and specific elicitation by the undercover "agent," at most should not have been regarded as anything other than idle chatter. See, e.g., **United States v. Phillips, 664 F.2d 971** (5th Cir. 1981). Also see **United States v. Green, 600 F.2d 154, 157-158** (8th Cir. 1979); and **United States v. Fielding, 645 F.2d 719, 726** (9th Cir. 1981).

Thus it is obvious that if it is the law that any statement made by one shown to be a conspirator is automatically admissible, then the central requirement of Rule 801(d)(2)(E) -- that the statement must also be *in furtherance* of the conspiracy -- would lack any legal significance. For, to be admissible, all the prosecution would be required to show is that a particular statement was made by a co-conspirator and it would automatically be admissible against all members. Indeed, this appears to have been what occurred here. For our trial Court simply credited the fact *of his determination* that a conspiracy existed as providing a sufficient basis for him to retroactively validate the admission of *everything* that was said on the tapes and otherwise by Grosser (the undercover informant) and by Ellington (the asserted co-conspirator). (See Tr., 946.)

Under the theory of exclusion, here being contended for, idle chatter, mere chitchat, casual admissions of culpability *and* even wild assertions (including noise and static), such as that

which typifies boastful oratory of the like engaged in by Ellington, would automatically be regarded as inadmissible. See **United States v. Doerr, 886 F.2d 944, 951-952 (7th Cir. 1989)** and **United States v. Paone, 782 F.2d 386 (2d Cir. 1986)**.

In our judgment, the statements being assailed here did not qualify for admission for the further reason that, simply put, they are too insufficiently reliable to be considered as proof even that they were uttered and clearly should not qualify as proof of the matter asserted. Here our reference is to those statements that were not on the tapes.

Here the Court is referred to the cogent observation by one Court that:

> The requirement that the statements have been in furtherance of the conspiracy is designed both to assure their reliability and to be consistent with the presumption that the co-conspirator would have authorized them. The requirement is not satisfied by a conversation such as the one here, which amounted to no more than idle chatter.

United States v. Lieberman, 637 F.2d 95, 103 (2d Cir. 1980).

Significantly, this same point was well made in **United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979)**, where the Court reasoned that for declarations to be admissible as having been made in furtherance of a charged conspiracy, they must have been intended to further the common objective of the conspiracy.

Additionally, many of the statements admitted fell into the category of being mere "conversations", or they were "merely narrative declarations," which were beyond the scope of any conspiracy that the asserted declarant was a member of. See **United States v. Phillips, 664 F.2d 971 (5th Cir. 1981)**, where this point about "idle conversation" (id., 1027) and "retrospective comments in conversations about past events" (id., 1026) not being admissible, was expressly credited. Also see **United States v. Moore, 522 F.2d 1068 (9th Cir. 1975).**

In our judgment, not unlike the situation in **United States v. Moore,** referred to above, the prosecutor has so far been unable to even suggest a reasonable interpretation of "... [Ellington's

rambling statements about Litho Range], or the facts surrounding ... [their] making that could reasonably ... lead to the conclusion that the[se] statement[s were] somehow 'in furtherance' of the [charged] conspiracy" (id., at 1077).

(III) Due Process Was Denied When The Trial Judge Refused To Instruct The Jury That Evidence Admitted Under Favor Of Rule 801(d)(2)(E), Could Not Be Regarded As Substantive Evidence Of The Petitioner's Guilt Of The Conspiracy Charge.

As is easily distilled from the several arguments made above, there is a serious distinction between the significance of evidence admitted under Rule 104 in order to satisfy the requirements of Rule 801(d)(2)(E) *and* the quantum of evidence required to prove the Title 21 U.S.C. §846 crime of conspiracy. To begin with, in the former instance, we are only talking about the admission of evidence as prima facie proof of a conspiracy; in

the latter instance we are talking about proof of guilt itself. In one instance the burden of proof is the preponderance of the evidence whereas the burden of proof is beyond a reasonable doubt with reference to the conspiracy offense itself.

Now, the government has argued, and will probably argue again, that evidence admitted to satisfy the condition precedent requirements of Rule 801(d)(2)(E), can also be regarded as substantive proof of the charges themselves.

Here, it is worth repeating that **Bourjaily** made the very significant point that "the evidentiary standard [for the admission of evidence under 801(d)(2)(E)] is unrelated to the burden of proof on the substantive issues" (**107 S. Ct. 2778**). Also, it should be noted that while we have again cited several other cases to support this thesis, these cases will again be ignored by counsel opposite.

So postured even if the evidentiary standard for the admission of the challenged evidence was properly met, it is a *non sequitur* to argue, because it does not follow, that the defendant

was therefore proven guilty of the charged conspiracy offense beyond a reasonable doubt. Again, the point to be made is that for a considerable quantity of the evidence here being assailed to be admissible, under Rule 801(d)(2)(E), the proof had to show the existence of a conspiracy that included the declarant (Eugene Ellington) and Litho Range, the party against whom the evidence is admitted. With reference to the Title 21 Conspiracy offense, the proof required the establishment of that relationship beyond a reasonable doubt. See, **United States v. Gil, 604 U.S. 546 (7th Cir. 1979)** and **United States v. Trowery, 542 F.2d 623 (3d Cir. 1976)**.

A further aspect of the distinction (between the admission of statements under Rule 801[d][2][E] *and* the quantum of proof required for a conviction) is the insuperable fact that a member of the charged conspiracy (here, Ellington and/or Jay Jackson) may not make another person a member simply by saying so. In a nutshell, Litho Range cannot be said to have been proven to be

guilty simply because he was said by Ellington to have been his partner.

Distilled, what we are saying is that while the existence of a conspiracy, in an evidentiary sense, can be based on declarations admitted under Rule 801(d)(2)(E) along with other evidence showing the statements and acts of all the alleged conspirators, "a particular defendant's membership in ... [such] conspiracy, if any, must be based on evidence limited to that defendant" **United States v. Ortiz, 883 F.2d 515, 521 (7th Cir. 1989)**. This being so, it follows that the Court of Appeals was required to review the sufficiency of the evidence with reference to Range's conviction solely on the basis "of what he did or said" (ibid).

Stated another way, the critical point in this circumstance seems clearly to be that Range could properly be convicted of the crime of conspiracy only on the basis of proof of his own conduct and acts. The proof even here must prove his *participation* in the conspiracy when at least one of the overt acts charged in the

conspiracy was committed by a co-conspirator. See **United States v. Brown, 335 F.2d 170, 172 (2d Cir. 1964)**. Also see **United States v. Ortiz, 883 F.2d 515, 520 (7th Cir. 1989)** and **United States v. Esparza, 876 F.2d 1390, 1393 (9th Cir. 1989)**.

The cogency of the points here being made become even more manifest when one realizes that if a jury is only permitted to find that the membership/participation element has been satisfied by the defendant's own actions and words, *then* clearly the fact that Range himself did nothing that qualified him for a conviction of the charged conspiracy really dictates the required position this Court must surely take with reference to the particular arguments made in this segment of our Petition.

Also, as to our request for the instruction centralized under the topic here being discussed (Tr., 917-919, & 1046), the following quote from the Seventh Circuit's Opinion in **Ortiz**, rendered after **Bourjaily**, not only captures one of the arguments being advanced by Range, if it is valid it shows the extent to

which Range was victimized by the Court's unwillingness to give our requested charge (id., 1046). Here the Seventh Circuit wrote:

> ... the Court [in **Bourjaily**] did not say that proof of one's membership in a conspiracy *for the purpose of a conviction* may be based on evidence other than or in addition to that defendant's own statements and acts. Indeed, the Court suggested that this was not the case since the standards for admissibility of evidence and for a criminal conviction are 'unrelated.' Ibid. The standard of proof was not in issue in *Bourjaily*, only the standard for admitting evidence.

Ortiz, 883 F.2d, at 520.

Having taken the above position, the Seventh Circuit (in a position that markedly contrasts with that taken by Judge Manos in rejecting our requested instruction [Tr., 917-18]), then concluded that:

> Accordingly, the rule in this circuit remains that in determining whether or not a defendant was a member of a conspiracy the jury must be instructed that it can only consider evidence of what the defendant did

> or said. *Another member of a conspiracy may not make the defendant a member of the conspiracy simply by saying that he or she was a member.* Obviously, determining whether or not a defendant was a member of a conspiracy must follow a finding that a conspiracy existed. And determining whether or not a conspiracy existed can be based on evidence of acts of or statements by all alleged conspirators. However, a particular defendant's membership in the conspiracy, if any, must be based on evidence limited to that defendant.

Ortiz, 883 F.2d, at 520.

In this case clearly the informer, Walter Grosser, by engaging Ellington in conversations was doing the Government's bidding. This being so, the jury's exposure to his statements, which sought responses to his most inquisitive references to Range, and which generated responses that either, accused Range of criminal conduct or put his character in issue, cannot possibly be defended. Nor can it be shown that Ellington's responses to these questions were made "in furtherance of" any possible

conspiratorial relationship that may have existed between Ellington and Range. **See United States v. Ferra, 900 F.2d 1057, 1059 (7th Cir. 1990).**

Now, the Government may offer some *belated* suggestion that this evidence was admissible for some limited purpose. However, any failure by the Government to reckon with the fact that when this evidence was offered and admitted it was as substantive proof, will make our point. Indeed, this was the *sole* basis for its admission. This follows because the Court's refusal to limit this evidence, as it was requested in writing to do, leaves no other conclusion available. (Tr., Vol. 7, pp. 916-918 and 1046.)

Simply put, nothing was said by the Government or the Court that in any way limited, or conditioned, the admission of any of the assailed evidence. The upshot of this is that the jury having heard this evidence without any admonishment from the Court perforce regarded the evidence itself *as proof of the matters*

asserted -- i.e., as substantive evidence. In other words, it follows here that because the jurors were not enjoined from making substantive use of statements made by *Grosser and Ellington* against Range, it must be assumed they did so. Clearly any such use would be a violation of Range's confrontation rights.

Still another point to be made here credits the fact that limiting instructions have been recognized as the only way to deal with the tape recordings in the face of a confrontation challenge. See **Lee v. McCaughtry, 892 F.2d 1318 (7th Cir. 1990).** Also, it should be emphasized that this Court is yet to retreat from its central holding in **California v. Green, 399 U.S. 149 (1970).**

With the above quotes as givens, the fact that the jury was in no way advised as to any restrictions on their use of the conversation heard on the tapes, which in all instances did not contain any participation by Litho Range, truly puts this issue in context. For if a constitutional issue emerges as to whether even a limiting instruction is adequate in situations of this ilk, then

surely any conclusion that the admission of this evidence can be validated on general principles would truly be farfetched. See **United States v. Keplinger, 776 F.2d 678, 695 (7th Cir. 1985)**. Cf., **Richardson v. Marsh, 481 U.S. 200 (1987)**, which likewise placed its emphasis on the presence of limiting instructions of the type missing here.

(IV) The Petitioner Was Denied The Right Of Confrontation When His Counsel Was Denied The Right To Make Effective Use Of The Contents Of A Motion To Suppress The Confession Made By One Of The Government's Chief Witnesses, Which Contents Would Have Tended To Impeach The Testimony Of Several Government Witnesses.

First off, the need for the testimony of Jay Jackson's counsel relates to the fact that his evidence indisputably bore, not only, on the credibility of his client, but also on the testimony of various

agents.

Here the Record shows that Jay Jackson, following his arrest and before he was converted into a government witness, first sought to gain his release on bail in spite of a detention order. Additionally, through his counsel Jay Jackson filed a Motion to Suppress his confession.[4] In this Motion several serious allegations were made by his appointed counsel. Some of these allegations specifically and seriously contradicted testimony rendered by Jay Jackson and by Agent Moritz.

Counsel for Range then sought to question Jackson's attorney concerning the allegations made by him in various documents prepared by him. Significant here, Jackson's counsel (claiming the attorney/client privilege) actually refused to testify. (Tr., Vol. 6, 987.)

In condoning this refusal to answer questions even the

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[4] This document was referred to, and admitted, as defendant Range's Exhibit "A" (**Coticchia**, at Tr., Vol. 7, p. 920).

Court considered valid, the Court first indicated the defense would be allowed to show the presence of certain segments of the statement. (Tr., Vol. 7, p. 922.) However, once counsel sought to do this, the Court abruptly changed pace and outright refused to allow counsel to expose serious contradictions between Jackson's testimony and what he alleged in his Motion to Suppress the confession made by him. It was this confession that he and his counsel had tried to convince the Court had been obtained in violation of his rights.

Our point here is emphasized in the following segments of the Record:

MR. WILLIS: I move the admission, your Honor, of the exhibit.

THE COURT: To the limited extent?

MR. WILLIS: Yes.

THE COURT: It will be admitted only to the portion indicated by the Court.

* * *

MR. WILLIS: May I publish those segments to the jury?

THE COURT: Let's see what you're going to publish.

* * *

THE COURT: I have admitted this. And we have now before the jury that there was a statement made, but it is not admitted in any way as to the truth of that statement or otherwise. Is that ... what is it you want to publish?

MR. WILLIS: I want to publish this segment right here, that's one; and the segment right here, ... that's two.

THE COURT: *Read it into the record.*

MR. WILLIS: Agent Moritz told Jackson that if he cooperated and testified, he would get a break on his sentence. He was told that being only 21 years old, ten years was a long time to spend in jail. He was also warned that if he didn't cooperate and ended up in the penitentiary, at his

young age, he would end up being some prisoner's bitch. The agents told Jackson if he cooperated, they would help him. Jackson was told that if he thought he was tough, the agents would put him in the same cell with Ellington.

Now, talking about Moritz --

THE COURT: Just a second, you will not read that because I indicated to the jury that this isn't being offered to prove the truth of the matter asserted; this is being offered solely to show that the statement was coerced. You've told them that. The jury knows that this was offered to show that the statement was coerced and therefore it should be suppressed. That's how the jury is going to know.

This goes to the truth of the matter asserted, these DEA agents said this. That's my ruling.

MR. WILLIS: Could I proffer this into the record?

THE COURT: Yes, you can proffer it.

MR. WILLIS: My understanding is that I would be allowed to show that Agents Ventura and Moritz were the persons who Mr. Coticchia represented to the Court had said these specific things to him. That was the basis of my inquiry of Mr. Jackson. And I think that this is a prior inconsistent statement which is admissible under the rules. And *I feel I have a right to specifically inform the jury as to exactly what it was that was represented as having taken place in connection with the coercion, and that's all I wanted to do.*

He's mentioned Moritz and Ventura and being a bitch. And that's -- he denied that on the witness stand. And *he denied Moritz and Jackson -- and Moritz and Ventura were the ones who told him they would put him in the cell with Litho Range.*

I believe I have a right to show that Coticchia reflected

> *a contradiction to that testimony in his motion that he filed with the Court*, and I wanted to publish those things to the jury at this point.

(Tr., Vol. 7, pp. 922-925.) (Emphasis supplied.)

The right of an accused to impeach any witness who testifies against him is really beyond dispute. Clearly then, Litho Range had a right to present evidence, which if believed, would have tended to show that various witnesses lied in their evidence. Here our reference is to the testimony by Jackson and the Federal agent that they did not exert illegal pressure in an effort to convert him into a federal witness.

Since information supportive of our thesis was formally filed with the Court, the conclusion that the defense could not make full use of this evidence is, in our judgment, indefensible.

(V) The Evidence Here Was Insufficient To Support The Defendant's Conviction For The Charged Conspiracy (21 U.S.C. §846).

(A)

The sum and total of the Government's proof of Litho Range's alleged guilt came from the testimony of two witnesses. One of these was Walter Grosser, the government's paid-informant. The other was Jay Jackson, a co-defendant on the indictment. The testimony of Jay Jackson was likewise purchased by the Government with the consideration involved in the sweetheart deal made with him after (according to him) he had been abused by the agents and otherwise denied his right of counsel.

The testimony provided by Grosser, who had no personal dealings with Range involving drugs or drug related matters, included his revelation of the contents of numerous conversations he supposedly had with the co-defendants in this case. All of this testimony was objected to. Indeed, as discussed earlier (*Ante*, pp. 7-12), this evidence clearly had such significant persuasive force that it can hardly be denied that it clearly influenced the guilty

verdict issued in this case against Range.

This is so *despite* the indisputable fact that the testimony provided by, both, Walter Grosser and Jay Jackson was internally inconsistent and contradictory. Additionally, even from a reading of the cold Record, it is at once apparent their evidence was of questionable credibility. Simply put, the government had to know then, as it surely does now, there is no way to defend the blanket admission of the entirety of all of the conversations Grosser had, or testified he had, with Ellington in which these gross references to Range were made. Because this is so, first off the Government will surely bombard us with an array of equally unconvincing (and outright specious) arguments in favor of admission; then the Government will surely argue that in any event admission was harmless. Of course, the farfetchedness of this argument likewise should magnify the cogency of our thesis in this regard.

This follows because the obviousness of the fact that the government had no business offering this evidence, when coupled

with its less than forthright method of not only creating, but in actually getting this evidence before the jury, will surely belie any contention that its case against Range was overwhelming. And, for that reason the wrong involved was harmless.

Still, the bottom line is that Litho Range was not shown beyond a reasonable doubt to have conspired with anyone. This conclusion is really augmented by the lack of any proof he was involved in any of the transactions relied on by the government. The question then is: was it reasonable for the jury to credit Jay Jackson's naked, totally uncorroborated, self-serving testimony that Litho Range, on three or four occasions had brought a pound of heroin to the house, which was then said to have been delivered to Eugene Ellington?

Now, apart from the credibility problems one would naturally have with Jay Jackson's testimony, the fact that he was thoroughly impeached to the extent that he was, surely makes the jury's acceptance of his testimony most tragic. Additionally, it is

indisputable that Jay Jackson never testified he actually inspected what he described, in his evidence, as heroin that was supposedly delivered by Range to Ellington. The upshot of this is, there is nothing in Jackson's evidence that could have provided sufficient foundation for the jury to conclude beyond a reasonable doubt that heroin was delivered by Range to Ellington -- if indeed anything at all was delivered. Postured by the above evidence, it is being contended that *even if* this evidence is considered in the light most favorable to the government, *and even if* the government is given the benefit of any and all the reasonable inferences that can arguably be drawn from his testimony, still there is simply no way any reasonable jury should have reached the conclusion beyond a reasonable doubt that Range was guilty of the criminal offense of having *conspired* with Eugene Ellington.

This point is also well made when one looks for proof Litho Range actually *participated* in any conspiratorial relationship with Ellington. This is especially so since actual *participation* is

indeed an element of the conspiracy charge. And, proof of a particular individual's participation as a member of the charged conspiracy can only be established on the basis of his "actions and reactions to the circumstances" **United States v. Barrett, 933 F.2d, 355 at 359 (6th Cir. 1991).** Also see **United States v. Garcia, 655 F.2d 59 (5th Cir. 1981)**, which this Court relied on for the above quote from **Barrett.**

Next, we repeat here the contention made to our Circuit that at most any relationship between Litho Range and Ellington could only be regarded as that of buyer and seller. For clearly it cannot be said they were fellow conspirators with a common goal as is required. See **United States v. Meyers, 646 F.2d 1142 (6th Cir. 1981), United States v. Johnson, 889 F.2d 1032 (11th Cir. 1989), United States v. Butler, 885 F.2d 195 (4th Cir. 1989)** and **United States v. Ford, 324 F.2d 950 (7th Cir. 1963).**

CONCLUSION

In the government's opposition to our post-trial Motion For

Judgment Of Acquittal, the government made the argument that "statements from Ellington as assertions made by Range ... directly related to the productivity, function of the conspiracy and members of it were properly admitted," id., p. 4. Also, counsel stated these statements "established the status of the defendant with respect to the conspiracy and how other conspirators were to conduct themselves in their activities" (ibid). This assertion should be compared with the statement made in **Bourjaily v. United States**, that a court must be satisfied that the [801(d)(2)(E)] evidence falls within the definition of the Rule. **Id., 107 S.Ct. at 2778**. And that statements of the ilk here involved are presumptively unreliable. Id., at 179.

Also, counsel made (in this same Brief, at p. 4) the argument that "evidence admitted under Rule 801(d)(2)(E) constitutes substantive evidence of the defendant's guilt". Obviously only a prosecutor would argue, as our prosecutor obviously does, that the "in furtherance" limitation on 801(d)(2)(E)

evidence should not be taken seriously. And, that all the government need show is that one proven to be a conspirator *mentioned* some other person in conversation with a federal agent and the person mentioned can automatically be regarded as a conspirator.

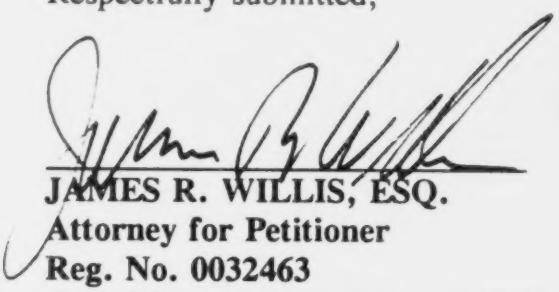
The lack of any authority for such a position makes it clear that argument will obviously not be made in the government's Response to our Petition. Nor will the government argue that 801(d)(2)(E) evidence is admitted as substantive proof.

Once it becomes apparent that in the various instances when Ellington's mentioning Range's name in conversations with the government's informant was admitted, Ellington must be regarded as a non-testifying declarant. The point being made here is that statements of this type invariably prejudice any non-declarant co-defendant. Clearly Range must be viewed as a non-declarant co-defendant. When viewed in that sense, clearly we have a **Bruton** problem here. See **Bruton v. United States, 391 U.S. 123, 126**

(1968). Also see **United States v. Basey, 816 F.2d 980, 1004 (5th Cir. 1989)**.

For all of the reasons argued above the conviction herein should be reviewed. Further, to the extent certain issues are credited, the District Court should be required to enter final judgment for the petitioner.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Reg. No. 0032463
Suite 350, Courthouse Square Bldg.
310 Lakeside Avenue, NW
Cleveland, Ohio 44113
(216) 523-1100

NO. 92-1853

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LITHO RANGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 350, Courthouse Square Bldg.
310 Lakeside Avenue N.W.
Cleveland, Ohio 44113
(216) 523-1100

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No. 91-3619

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	**O R D E R**
	)	
LITHO R. RANGE, JR.,	)	
	)	
Defendant-Appellant.	)	

BEFORE: JONES and NORRIS, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing

APPENDIX "A"

and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 91-3319 & 91-3620

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LITHO RANGE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF OHIO

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JAMES R. WILLIS, ESQ.
Reg. No. 0032463
Attorney for Defendant-Appellant
Suite 350, Courthouse Square Bldg.
310 Lakeside Avenue, NW
Cleveland, Ohio 44113
(216) 523-1100

APPENDIX "B"

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the panel decision, rendered herein is so significantly flawed, with reference to several very distinct holdings that, both, for fear that such holdings might go forth as the position of this Court and because in counsel's judgment, they truly offend the due process concept of fundamental judgment and even handed justice, they should be considered by the full Court.

Specifically, as argued below the following contentions are being made:

(a) Given the unassailable finding that Ellington (the co-defendant) should have been granted a Mis-trial early on in this trial, the conclusion that due process would have required such a finding for this appellant as well at that time is simply to compelling to be overlooked, as it was without comment by any reviewing Court. When we take into further consideration that the Court also credited the same witness whose statements victimized Ellington, also revealed to the jury that this appellant had been recently released from jail, which was held not a very sufficient faus pas, when considered together we certainly have a far different mix than that which confronted counsel at any point

earlier than when the ruling was made that Ellington should have been granted a Mis-trial. Obviously then whether the resulting issue here can be raised for the first time in an Application for Rehearing is something the entire Court should address.

(b) The panel's decision that all evidence considered in determining the admissibility of statements offered under favor of Rule 801(d)(2)(E), are automatically deemed admissible if the statements for which admission was being sought are deemed admissible. This holding seems clearly to clash with the holding in **United States v. Bourjaily, 483 U.S. 177, 107 S. Ct., 2775 (1987)**, which not only determined that "co-conspirator statements ... have been considered to be somewhat unreliable" (id., at 2790), but also made a further point of critical significance here.

Specifically, and clearly the panel did not reckon with the determination made in *Bourjaily* that "the evidentiary standard [for Rule 801(d)(2)(E) evidence] is *unrelated* to the burden of proof on the substantive issues" (id., 2778). *(Emphasis supplied.)*

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 91-3319 & 91-3620

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LITHO RANGE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Litho Range, the appellant herein, moves the Court under favor of Rule 40, Federal Rules of Appellate Procedure, for a Rehearing of his appeal. Further, the appellant makes the clear

and unequivocal Suggestion (as is permitted by Rule 35) that this cause should be considered en banc by the entire Court.

In support of this Petition for Rehearing En Banc, the following specific contentions are made:

I

Clearly the fact that the panel (in the Opinion[1] released herein) fully credited the trial Judge's insufficient response to the objection made by this appellant (to an inappropriately volunteered statement by the Government's most critical witness -- *i.e.*, Jay Jackson) as being dispositive of the co-defendant's appeal is a matter deserving intense scrutiny by the entire Court. Here we start with the cogent and compelling finding, by the panel, that the error involved was so prejudicial as to actually be impervious to any curative or corrective instructions that could even be imagined.

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[1] For the convenience of the Court in an effort to facilitate easy reference, the Opinion is attached to this Application as an Appendix.

This finding alone makes it manifest that the effect of this critical flaw should be analyzed in a light far different than counsel for this appellant could have ever anticipated.

Postured then by the finding here being referred to -- *i.e.*, that a mistrial should have been directed in Ellington's favor at the point of the infraction *(Appendix to Published Opinion, at p. 4)*, the need for Range's appeal to be looked at in a different light is so compelling as to literally be inescapable. Now we certainly concede that "absent extraordinary circumstances" an appellate issue cannot be raised for the first time in an Application for Rehearing. See **Moore v. United States, 598 F.2d 439 (5th Cir. 1979)**. *Cf.*, **United States v. LePatourel, 571 F.2d 405, 410-411 (8th Cir. 1978)**, where "the interest of the administration of justice" was deemed a sufficient basis to warrant the Court giving meaningful and dispositive attention to an issue raised for the first time in a Rehearing context.

Indeed, it is really beyond dispute that the Court's *oversight*

concerns necessarily include the right to resolve an issue not specifically passed on by a full panel. This is particularly so where, as here, the resolution of such issue in favor of the accused is beyond any doubt or, also the case here, an injustice would surely result if the Court failed to do so. See **Singleton v. Wulft, 428 U.S. 106, 121 (1976)**. Also see, in this regard, **Schanen v. United States Department of Justice, 798 F.2d 348, 349 (9th Cir. 1985)**, where the Court *allowed* the Government for the first time to advance in an Application for Rehearing an issue that had not even been raised at the trial level. As to this, surely what is good for the goose is also good for the gander.

The significance of the *Schanen* opinion should not be limited to the compelling fact that the Rehearing Application involved therein was submitted by the Government rather than some mere person -- against whom the Opinion had been rendered. Simply put, one should look to the fact that justice is always the objective of our judicial system, even when the asserted victim of

an injustice is not represented by an agent of the Government.

All this brings us to emphasize that when the contention here and now being made is considered in the light of the erroneous failure of the Court to have granted Ellington a Mistrial (which failure occurred before the bulk of the evidence in this case was proffered), a further weighty point is made here in favor of review. Now we fully recognize that the propriety of the trial judge's denial of the Motion for a Mistrial was not specifically raised as an appellate issue. But again, that truly is the fault of trial counsel who arguably could be condemned for, both, not fully assaying the possible impact of the flaw itself standing alone, or for not considering it in conjunction with *the flaw* that was yet to occur, which resulted in the event that led to the dramatic reversal of Ellington's conviction. So postured, the cogency of the point made becomes even more compelling.

As to this really dispositive contention, the following segment of the Record provides critical support for our thesis.

Here the Record shows the following occurred during Jay Jackson's cross-examination by counsel for Ellington -- appellant's co-defendant at the trial:

> Q. You told us this morning about your employment. Back in '83 and '84, you told the police, by way of written statement on November the 1st, that you worked at Litho Range's nightclub or bar. Are you remembering that?
>
> A. Yes.
>
> Q. Yes. How old were you in 1983 and 1984?
>
> A. Oh, I was about, let me see -- about 15 or 16.
>
> * * *
>
> Q. I see. Would you reconsider your testimony if I suggest to you that the paperwork for the purchase of the bar was done during the latter part of 1985 and that the bar was not opened until 1986?
>
> A. No.
>
> Q. That's your contention, between '83

and '84, you were the cleanup boy in Litho Range's nightclub?

A. That was about the years that I assumed. That wasn't no definite years, those the years that I assumed, Mr. Shaughnessy.

I can indicate for you, also, that *Litho [Range] was just returning home from jail then.*

MR. PETERSON: Your Honor, objection.

THE COURT: Sustained. There's no question to you.

* * *

(The following proceedings were had in chambers out of the hearing of the jury:)

MR. WILLIS: If it please the Court, during the cross-examination of Mr. Jackson at the hands of Mr. Shaughnessy, this witness, without the benefit of a question before him, *proceeded to volunteer and indicate to the jury, obviously with the intent to injure the defendant, Litho Range, that Mr. Litho Range had recently come home from the penitentiary which he associated with the opening of the bar, I suspect.* I think that that testimony was devastating to the defendant. Mr. Range had no intention of putting -- of testifying, and thus putting the issue, any issues about his prior incarceration, his prior convictions before the jury.

> And because I think it was willful, I feel that the Court ought to grant Mr. Range a mistrial. I don't think that any instruction, curative instruction, could ameliorate this situation or neutralize it.
>
> THE COURT: The Court's recollection is that the witness began to make a statement which was made immediately after an answer was offered to a question which was put to him. The first part of what he had begun to say related to the answer that he gave pursuant to the question, and an objection, as he began to expound further, was immediately made, sustained by the Court. And *it's not the Court's judgment that the jury became aware of anything that is detrimental to Mr. Litho Range sufficient for the Court to declare this trial a mistrial. Overruled.*

Jackson, Vol. 2, pp. 168-171. (Emphasis supplied.)

II

Also of critical significance, with reference to the Petition before the Court, is the insuperable fact that Range was truly and undeniably victimized by the trial Court's admission of what the panel termed proper 801(d)(2)(E) evidence. The fact that this conclusion was premised upon a rather summary rejection of our specific argument that a considerable quantity of this evidence was,

at most, only "'idle chatter'" and consisted of statements that could not possibly be regarded as having been "made in furtherance of the charged conspiracy" *(Appendix to Published Opinion, pp. 3-4)*, further accentuates the serious flaws here being centralized.

In our judgment, it seems rather obvious that even if we fully credit the finding that all of the statements actually made by Ellington were properly admitted because "statements are made in furtherance of a conspiracy when they identify its participants, reveal the source or purchaser of controlled substances, or inform participants of the status of the conspiracy" *(ibid)*, the panel's resolution seems rather arbitrary. Simply stated, the real problem with this resolution is that it simply does not address the problem involving wilfully calculated statements made by the Government informant in this case. The fact that this witness admitted he was directed to insert the name of Litho Range, the appellant herein, into conversations that were artificially precipitated and *manipulated*, by him at the Government's direction, *for the sole*

purpose of having Ellington make comments that could be used against Range is hardly something that should not have even been discussed -- to say nothing of being reckoned with.

This being so, the panel's conclusion that in its "estimation, *Ellington's* statements fall well within these parameters, particularly when taken together with the totality of the testimony introduced during trial, which included Jackson's account that Range had made four deliveries of pure heroin to Ellington's home and frequently visited to collect his share of the proceeds" *Id. p. 4*, is truly exposed as being besides the point. While that is really bad enough, the further fact exposed in the panels' hollow thesis shows that the Court apparently paid no heed, none whatsoever, to the *indisputable* fact that the most egregious references to Litho Range in these conversations *were not contained in statements made by Ellington*, as the panel inferentially determined, but in statements *made by the informant* to Ellington and others. This follows because *of all the statements made by Ellington*. Even *if*

we assume all of his statements were admissible, they pale into insignificance in the wake of the intentional and well-crafted, devastating characterizations of Litho Range intentionally made by the Government's paid informant at the insistence of his orchestrator. Our reference here is to the following segment of the Record of the informant's testimony:

> **Q.** In your business, you testified here you traded on other people's names. You mentioned Virgil, something about "KB," or Kenneth Bradley, or to suggest you knew him. You were kind of trading on his name to add prestige to your reputation; is that right?
>
> **A.** Right.
>
> **Q.** How do you know when Genie Ellington was using the name Litho Range he wasn't trying to add prestige to his conversations and whatever it was he was doing? You don't know that, do you, of your own knowledge?
>
> **A.** I can't prove it.

* * *

Q. Now, did the government tell you to insert into your conversations with Ellington when you were riding around looking for Mr. Jackson that Litho Range wanted him killed and that Litho Range was a killer, or something to that effect? You recall constantly throwing his name in connection with violence in that conversation? You remember that, don't you?

A. I remember doing that, saying that, yeah. But it wasn't the government that had asked me to do that; it was from the previous conversation the day before.

Q. That was unrecorded?

A. That was unrecorded, right. I was trying to get it on the record, tape recorder.

Q. Now, ... it's true that ... invariably when Range's name would come into a conversation, you were milking it out of Genie?

A. Not all the time.

Q. Most of the time?

A. Well, after Eugene volunteered --

Q. No. Most of the time or not?

* * *

A. When Eugene Ellington gave me the name of Litho Range as his source of supply, then I asked him about it.

Q. In other words, you call[] that "picking," don't you? You were trying to pick him?

A. No, he volunteered that in the beginning.

Q. Okay. But once the name Litho Range hits into the mix, then you were constantly trying to pick him?

A. Yes, that's true.

Walter Grosser, at Tr., 548-550. *(Emphasis supplied.)*

In addition to the unequivocal thrust of the above testimony, which verifies our contention that far more damage was done by the statements made by the informant than by Ellington (the alleged conspirator, whose statements were deemed to be admissible under 801[d][2][E]) there were other statements *made by the informant*

the admission of which cannot be justified on any known theory.

Here our reference is to certain points made in our Opening Brief. Hopefully, the compelling impact thereof will not continue to be buried unnoticed and uncommented on by this Court under the cliched holding that these statements were made in furtherance of the charged conspiracy. Specifically, our reference is to the following contentions:

(9)

> In Exhibit No. 140, the taped conversation of October 11, 1990, Grosser (after being told by Ellington that "Litho" was "leery of Buddy" and believed that "Buddy was up with" the drug theft by Jackson) volunteered the egregious statement that if that were true "he wouldn't be here." This gross observation he punctuated by saying "if Litho kills you man [i.e., Ellington]" he would "talk to Jay" himself. *Id., 462-463.*

(10)

> Next, on this same tape, Grosser embellished his naked idea that Range was a killer by generating an

> egregious response from Ellington. This he did by asking: "what Litho thought, that Buddy would be in on it too:" And, by asking Ellington if he thought Ellington had actually "killed [Jay] Jackson who was at the time missing." *Ibid.*

Appellant's Opening Brief, p. 12.

Postured then by the panel's blanket endorsement of the trial Court's ruling that *statements* of the ilk referred to above as having been made by the Government's own informant, can be regarded as having been made in furtherance of a charged conspiracy, are automatically admissible even if they occurred while the informant was manipulating anyone and everyone he talked to into putting a person targeted by him in the worse possible light -- the informant's admitted purpose here.

Postured then by the panel's blanket endorsement of the trial Court's ruling that even those statements and insinuations wilfully made by an informant (no matter how devastating) are automatically admissible, the unanswered question that perforce

arises as to what are the limits beyond which an informant cannot go in wilfully manipulating an artificial conversation in the hopes that an asserted informant, either, affirmatively makes damaging statements against others not privy to the conversation, or, indirectly, by having them respond to questions that insinuate the existence of equally damaging facts.

III

In rejecting the argument that "the trial Court erred in refusing to instruct the jury that co-conspirator statements should not be considered as substantive evidence" *(Appendix to Published Opinion, p. 4)*, the ruling made by the panel seems clearly to have been somewhat arbitrary. If not that it is at least clearly misdirected. Indeed, in taking the position, indefensible in our judgment, that **United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir. 1989)**, validates the rejection of the proffered instruction: the Court proceeded to punctuate its thesis by categorically stating that the "defendant advances no compelling reason to justify a

departure from this practice in his own case," *(Appendix to Published Opinion, pp. 4-5)*.

At the risk of being unduly censorious, here it seems clearly to be the case that the failure to credit the appellant's arguments, made in his Opening Brief, at pp. 28 et. al., cannot be defended. This follows because once it is recognized, as was specifically stated in **United States v. Bourjaily,** that "the evidentiary standard [for the admission of 801(d)(2)(E) evidence] is unrelated to the burden of proof on the substantive issue," **(Bourjaily, at 107 S.Ct., 2728)**, we have our compelling reason for departing that was said to be lacking.

In further amplification of the criticism here being voiced,of the panel's refusal to reckon with holdings made in *Bourjaily*, the panel's holding that all evidence properly *considered under Evidence Rule 104*, in determining the admissibility of evidence proffered under Evidence Rule 801(d)(2)(E), is likewise rendered admissible if the *proffered evidence* is ruled admissible is likewise

flawed and indefensible.

Actually it should suffice to note that no Court, prior to the inferential ruling made in this case, has ever taken the outright position that all such evidence is admissible as substantive proof. With this being a fact surely more consideration should be given this issue before it goes forth as the law of this circuit. This is particularly so since clearly the expressed thesis can no more survive meaningful scrutiny than it can bootstrap itself into a viable precedent.

Nos. 91-3619/3620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff-Appellee,	:	ON APPEAL from the United States
	:	
v.	:	District Court for the Northern District
	:	
LITHO R. RANGE (91-3619), EUGENE ELLINGTON (91-3620)	:	of Ohio
	:	
	:	
Defendants-Appellants.	:	

Decided and Filed December 23, 1992

Before: JONES and **NORRIS,** Circuit Judges; **WELLFORD,** Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Litho Range and Eugene Ellington appeal their drug-trafficking convictions, which resulted in the imposition of thirty-year terms of imprisonment.

APPENDIX "C"

Although they raise numerous issues on appeal, we limit our discussion below to the enhancement for obstruction of justice that each received under the Sentencing Guidelines. All other allegations of error are addressed in a separate, unpublished appendix to this opinion. Because that Appendix explains our reasons for reversing Ellington's conviction, the opinion's effect is necessarily limited to the sentence imposed upon defendant Range.

The Sentencing Guidelines include the following provision: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." United States Sentencing Commission, *Guidelines Manual*, §3C1.1 (Nov. 1990). According to the Application Notes that accompany this section, intimidating witnesses and giving materially false information to a probation officer both represent the type of conduct to which this enhancement applies. U.S.S.G. §3C1.1, comment. (n.3 (a) & (h)).

During trial, the district court received three separate reports from the United States Marshals regarding inappropriate and disruptive behavior by the defendants. After the second incident, the trial judge addressed the following remarks to counsel in chambers:

> It's come to my attention that the two defendants are mouthing off. I want you to tell them once more that it's come to the Judge's attention and he is going to, for the second time, allow the lawyers to talk to them to tell them not to talk to witnesses, not to bad-mouth witnesses, not to look threateningly at witnesses, and I appreciate it.

The third report resulted in an on-the-record colloquy with Marshal Joe Thomas:

> MARSHAL THOMAS: ... Mr. Ellington has made two comments. Earlier today before lunch break he said that he was getting sick of being brought back and forth to court and he wasn't going to go back to the court. And after the last recess on the way down, he said that he, that tomorrow he was not going to come to court. And, furthermore, he wasn't even going to leave the Lake County jail tomorrow. And that's the sum and substance of it all.

> THE COURT: All right. I believe that he has made this statement perhaps as one which is puffing rather than one which is putting us on notice what he intends to do. There is no defendant who puts this Court on notice as to what he intends to do....
>
> . . . .
>
> If he offers the marshals any resistance, he is going to be chained, he is going to be gagged, and I'm going to put him in a straitjacket and bring him into court in that condition in the presence of the jury. I have a perfect right to do that if he offers resistance.

The record does not reveal any further instances of inappropriate conduct, although the government alleges that both defendants supplied the parole officer who prepared their presentence reports with false information.

At the sentencing hearing, the trial court assessed a two-step enhancement to the offense levels of each defendant for obstruction of justice. The court explained the reason for its decision in the following terms: "Adjustment for obstruction of justice, three times the marshals came to me and made complaints in connection with the conduct of Mr. Range and Mr. Ellington. And I will accept

and increase of two points for that conduct that I reported to the lawyers of such Defendants."

This court reviews the factual findings of the district court that relate to sentencing considerations for clear error. *United States v. Head*, 927 F.2d 1361, 1372 (6th Cir.), *cert. denied*, 112 S. Ct. 144 (1991). Moreover, the government need only prove the facts used in sentencing determinations by a preponderance of the evidence. *United States v. Chambers*, 944 F.2d 1253, 1271 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1217 (1992). For this court to perform its function properly, however, the record developed below must indicate with specificity what facts the district court considered in reaching its offense level calculation. The record now before us is simply too cryptic to enable us to say with the requisite degree of certainty that the decision to enhance the sentences of the defendants for obstruction of justice is free of error.

Several considerations lead us to this conclusion. First, we

note that both defendants received enhancements for obstruction of justice. However, the district court failed to differentiate between the two during the sentencing hearing. We know from the record, for instance, that only Ellington was reprimanded a third time. Yet the trial judge's remark, that "three times the marshals came to me and made complaints in connection with the conduct of Mr. Range and Mr. Ellington" leaves open the possibility that defendant Range was penalized for the behavior of his co-defendant. When more than one defendant is being sentenced at the same hearing, it is of critical importance that the district court state with clarity the facts on which it relies in sentencing each defendant.

A second area of concern involves the reports received by the trial judge that the defendants were "looking threateningly" at the witnesses. Although the judge did not indicate whether this behavior factored into his decision to enhance the sentences for obstruction of justice, we assume from the in-chambers remarks already cited that it may have. That being the case, we find the

record inadequate to support the use of this conduct to enhance defendants' sentences. By anyone's measure, the interpretation of a "look" is sufficient subjective to merit further factual development. At the very least, the appellate record must contain enough detail to satisfy us that the conduct in question was intended to intimidate witnesses. The trial court's comment that it had received a report that defendants were "mouthing off," followed by its admonition not to "look threateningly at witnesses," does not provide us with the underlying detail necessary to an independent review on appeal.

In remanding, we do not mean to suggest that the district court must conduct an extensive adversarial hearing. Instead, we seek to provide the court with an opportunity to develop, on the record, the precise reasons for its decision to apply the obstruction of justice enhancement, so that we will be in a position to review verifiable facts rather than subjective impressions. These findings should be sufficiently individualized so that we can review Range's

sentence separately. Finally, should the district court rely on the report that defendants were "looking threateningly" at witnesses during trial, it should describe on the record the indicia that led to this conclusion. Such indicia might include words or gestures that accompanied the conduct, the identity of the persons at whom the looks were directed, or the timing of the objectionable behavior.

For the foregoing reasons, the sentence of defendant Range is **vacated** and this cause is **remanded** for further proceedings consistent with this opinion.

Nos. 91-3619 & 91-3620

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	
Plaintiff-Appellee,	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
v.	
LITHO R. RANGE (91-3619), EUGENE ELLINGTON (91-3620)	**APPENDIX TO PUBLISHED OPINION**
Defendants-Appellants.	

BEFORE: JONES and **NORRIS,** Circuit Judges; **WELLFORD,** Senior Circuit Judge.

PER CURIAM. This appendix addresses the remaining issues raised by defendants Litho Range and Eugene Ellington.

I.

Defendants were charged along with three other individuals in a thirteen-count superseding indictment that alleged violations of 21 U.S.C. §841(a)(1) (distribution of a controlled substance), 18

U.S.C. §2 (aiding and abetting), and 18 U.S.C. §1956(a)(1)(B)(i) (money laundering). These charges stemmed from a government investigation into heroin trafficking in Cleveland, Ohio.

On March 21, 1992, a jury found both Range and Ellington guilty of conspiracy to distribute heroin. It also found Ellington guilty of six substantive counts of distribution. The district court subsequently sentenced both men to 360 months' imprisonment, five years' supervised release, and a $50 special assessment on each count of conviction.

II.

We turn now to the specific allegations of error urged by defendants.

A. Introduction of Tax Return Information

During the course of the trial, the district court permitted Internal Revenue Service agent Arthur Ventura, Jr., to testify that Ellington had not filed federal income tax returns. Ellington argues that the admission of Ventura's testimony was both

irrelevant and prejudicial.

We begin by noting that challenges to the relevance of evidence admitted by the trial court are reviewed for abuse of discretion. *United States v. Walton*, 909 F.2d 915, 925 (6th Cir. 1990). Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

In this case, the government sought to show that defendant neglected to file an income tax return despite the acquisition of significant financial assets. A jury could reasonably infer from such behavior that Ellington tried to hide his income because it resulted from illicit activity. The use of tax returns to point out discrepancies between reported and actual income meets the test of relevance, *United States v. Newton, 891 F.2d 944, 948 (1st Cir. 1989)*, in light of the fact that the concealment of proceeds from drug trafficking is an undeniable facet of a conspiracy to distribute

narcotics. *United States v. Towers*, 775 F.2d 184, 187 (7th Cir. 1985) (citing *United States v. Metz*, 608 F.2d 1417, 153 [5th Cir. 1979).[1]

Accordingly, we conclude that the district court properly exercised its discretion in permitting the admission of Ventura's testimony about the tax returns.

B. Sufficiency of the Evidence

Both Ellington and Range contend that the evidence presented during trial was insufficient to support their convictions for conspiracy beyond a reasonable doubt. Accordingly, they argue that the district court erred in denying their motions for acquittal.

To prevail on this issue, defendants bear a heavy burden. In reviewing such claims, this court assesses "whether, after

---

[1] In reaching this conclusion, we distinguish this court's recent decision, *United States v. Carter*, No. 91-1830, 1992 U.S. App. LEXIS 15513 (6th Cir. July 8, 1992). *Carter* acknowledged that the use of tax returns is permissible when, as in the instant case, the defendant "engaged in extravagant spending and /or possessed massive unreported wealth." *Id.*, slip. op. at 7.

viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319 (1979)*(emphasis in original). The record before us contains sufficient evidence to sustain the conspiracy convictions of both men.

Both defendants focus their attack on the credibility of witness Jay Jackson, observing that his testimony contained internal inconsistencies and was inspired by the favorable plea bargain that he negotiated with the government. Furthermore, they contend that Jackson's past criminal behavior and substance abuse calls his veracity into question. This argument overlooks one essential point: defense counsel made the jury fully aware of these alleged testimonial infirmities. Nevertheless, its members chose to find his testimony, at least when coupled with that of other witnesses, sufficiently credible to support a conviction. We are not prepared to say that, given the facts before it, the jury's verdict was

irrational.

C. Co-conspirator Testimony

Defendant Range challenges the admission of co-conspirator testimony attributed to Eugene Ellington by witness Walter Grosser, who aided the government during its investigation of suspected drug trafficking.

Fed. R. Evid. 801(d)(2)(E) provides that "[a] statement is not hearsay if ... [it] is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Before the statement of a co-conspirator can be introduced, however, the trial court must decide if there is sufficient evidence to establish that a conspiracy existed between the declarant and the defendant. The standard of proof required to resolve this preliminary factual question is a preponderance of the evidence. *Bourjaily v. United States, 483 U.S. 171, 175 (1987).* When the admissibility of a co-conspirator's statement represents a close call, this court will not

generally disturb the ruling of the trial court. *United States v. Hitow, 889 F.2d 1573, 1581 (6th Cir. 1989)* (citing *United States v. Hamilton, 689 F.2d 1262, 1270-71 (6th Cir. 1982), cert. denied, 459 U.S. 1117 [1983]).*

With that analytical context in mind, we now turn to Range's specific allegations of error. He cites ten different passages from Grosser's testimony that referred to statements made by Ellington regarding him. He argues that Ellington's statements, even if credited, constituted "idle chatter" and were not made "in furtherance of" the conspiracy.

A review of these statements, however, leads to a contrary conclusion. On balance, the remarks attributed to Ellington concern Range's participation in cash transactions and his role in the enterprise. As this court has noted, statements are made in furtherance of a conspiracy when they identify its participants, reveal the source of purchaser of controlled substances, or inform participants of the status of the conspiracy. *Hitow*, 889 F.2d at

1581 (citing cases). In our estimation, Ellington's statements fall well within these parameters, particularly when taken together with the totality of the testimony introduced during trial, which included Jackson's account that Range had made four deliveries of pure heroin to Ellington's home, and frequently visited to collect his share of the proceeds.

We also reject Range's contention that the trial court erred in refusing to instruct the jury that co-conspirator statements should not be considered as substantive evidence. This court has upheld the denial of similar limiting instructions in the past, *see United States v. Swidan, 888 F.ed 1076, 1081 (6th Cir. 1989)*, and defendant advances no compelling reason to justify a departure from this practice in his own case.

D. Confrontation Clause Challenge

Range next insists that his Sixth Amendment right to confrontation was compromised because the trial court placed some limitations on the examination of witness Joseph Cottichia, who

had served as Jackson's attorney. The ostensible purpose of calling Cottichia was to show that a confession Jackson made after his arrest had been coerced, which in turn would cast doubt on the testimony of Jackson as well as government law enforcement agents Ventura and Daniel Moritz.

We should note that the trial court permitted a motion to suppress filed by Cottichia to be introduced into evidence. This motion contained assertions that Jackson's confession had been involuntary, alleging that the agents "warned that, if he didn't cooperate and ended up in the penitentiary, at his young age he would end up being some prisoner's 'bitch.'" The admission of this motion into evidence certainly furthered the objective of Range's attorney to impeach the testimony of both Jackson and the agents.

The trial court was under no obligation to afford counsel for Range unbridled leeway in examining Cottichia. On numerous occasions, this court his observed that a trial judge has discretion

in limiting cross-examination. *See, e.g., Dorsey v. Parke, 872 F.2d 163, 166 (6th Cir.), cert. denied 493 U.S. 831 (1989).* In view of all the circumstances, we are unable to say that the trial court overstepped this discretion.

E. Sentencing Issues

As a final matter, we turn to challenges, not already addressed in the published portion of this opinion, regarding the calculation of both defendants' offense levels under the Sentencing Guidelines.

1. Role in the Offense

The district court enhanced Range's offense level by four points because it concluded that he was a "manager" in the offense. Section 3B1.1(a) of the Sentencing Guidelines permits such an enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." United States Sentencing Commission, *Guidelines Manual, § 3B1.1(a) (Nov. 1990).* It appears that the

district court misread the guidelines. Under § 3B1.1(b), a manager of a criminal activity receives a three-level increase, not the four levels imposed. U.S.S.G. §3B1.1(b). In addition, the court failed to identify the individuals that it included to reach the "five or more participants" requirement.[2]

2. Drug Quantity

Ellington contends that the trial court erred in the amount of heroin it used to calculate his offense level. Essentially, defendant asks us to rule that the amount of heroin attributed to the conspiracy should be excluded from the calculation. Instead, he wishes us to rely only on the amount of heroin actually seized. This we decline to do. The jury convicted defendant of conspiracy, and the law is clear that, under such circumstances, it is appropriate to use the amount of controlled substances attributable to the conspiracy in caclulating the offense level. See

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[2] While the trial court concluded that the criminal conduct was "otherwise extensive," there is nothing in the record to support this conclusion.

U.S.S.G. 1B1.3, comment. (n. 1, (1)(a) & (e)); *United States v. Paulino, 935 F.2d 739, 756-57 (6th Cir.), cert. denied*, 112 S. Ct. 315 (1991). Moreover, a district court's finding as to the amount of drugs a defendant will be held accountable for is a factual finding that this court must accept unless clearly erroneous. *Walton, 908 F.2d at 1300-01.*

We find no error in the trial court's calculation of the drug quantity.

3. Acceptance of Responsibility

Finally, Ellington contends that he should have been granted a two-step reduction in his offense level because he accepted responsibility for his criminal behavior. U.S.S.G. § 3E1.1. In support of his claim, defendant points out that he attempted to negotiate a guilty plea and never denied that he had some involvement in drug trafficking. We review the district court's denial of this offense-level reduction for clear error. *United States v. Fleener, 900 F.2d 914, 917 (6th Cir. 1990).*

While Ellington is correct in observing that exercising his right to a trial does not automatically preclude a downward adjustment for acceptance of responsibility, it undeniably makes his case more difficult, particularly because the defendant bears the burden of showing by a preponderance of the evidence that this reduction is merited. *United States v. Urrego-Linares, 879 F.2d 1234, 1239 (4th Cir.), cert. denied, 493 U.S. 943 (1989).* In our view, defendant has not met this burden.

F. Motion for Mistrial

The final assignment of error raised by Ellington concerns the testimony of his nephew, Jay Jackson. Although an original co-defendant, Jackson entered into a plea agreement with the government and later testified as a cooperating witness. During cross-examination, counsel for Range probed Jackson's past relationship with his uncle, which led to the following exchange:

> Q. He [Ellington] never tried to teach you to box?
>
> A. No.

....

No. He used to just come out there [to the juvenile youth home] and tell testimonies to the little kids. He used to just like being seen out there where I was, showing off. That's all he used to come out there for.

Q. Showing off his boxing pictures?

A. They barred -- can I -- they barred him off the premises. Why? Because he raped a little guy, a little guy --

MR. WILLIS: Your Honor --

THE COURT: Sustain.

Do not offer information not asked for by the question, Mr. Jackson. Listen carefully to the question; make your answer responsive.

Although counsel for Range objected to Jackson's answer, counsel for Ellington failed either to request a curative instruction or make a contemporaneous motion for a mistrial. Counsel did, however, move for a mistrial in a later conference held in chambers. This motion was denied.

Because counsel for Ellington failed to object to Jackson's

testimony in a timely fashion, we review for plain error. Fed. R. Crim. P. 52(b); *United States v. Cunningham, 804 F.2d 58, 63 (6th Cir., 1986), cert. denied, 481 U.S. 1037 (1987).* The reason for this requirement is obvious: the lack of a timely objection deprives the trial court of an opportunity to select the form of remedial action that will be least disruptive to the proceedings. See Fed. R. Evid. 103 advisory committee's note.

Some testimony, once put before the jury, simply mandates a mistrial. An example of such testimony arose in the case of *United States v. Gibson, 786 F.2d 1167 (6th Cir. Feb. 19, 1986)(table case, text in Westlaw, No. 85-5356)*, where a prosecution witness gave unsolicited testimony that the defendant was an escaped prisoner at the time of arrest. Defendant's motion for a mistrial was denied, and he was subsequently convicted. On direct appeal, this court considered whether the tainted testimony so adversely affected the defendant's substantial rights as to compel reversal. See *United States v. Terry, 729 F.2d 1063, 1070 (6th*

Cir. 1984). The standard of review utilized in *Gibson* was articulated well in *Kotteakos v. United States, 328 U.S. 750, 764-64 (1946):*

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the judgment should stand .... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

The *Gibson* court found that the one remark was enough to stain the entire trial. *See also United States v. Poston, 430 F.2d 706, 708-09 (6th Cir. 1970)* (reversal required where witness testified that the defendant was on probation).

Similarly, in this case, Jackson's unsubstantiated, uncalled-for, irrelevant, inflammatory, plainly prejudicial pronouncement simply could not be erased from the minds of the jurors. In the

context of the entire trial, one cannot say, with fair assurance, that the jury's judgment was not substantially swayed by the sepsis. *See United States v. Smith, 403 F.2d 74, 76 (6th Cir. 1968)* (mistrial mandated where witness testified that defendant had just been released from the penitentiary, even though jury acquitted defendant on one of the two counts in indictment).

The prejudice of tainted testimony is all the more plain when the defendant, as in this case, does not take the stand. "A criminal defendant who chooses not to testify at trial is entitled to a presumption of innocence. One sure way to destroy that presumption is for a seasoned officer to interject an 'inadvertent' remark about a defendant's criminal history." *Terry, 729 F.2d at 1070.* Terry makes it clear that the testimony need not be the calculated remark of a veteran officer; "'the touchstone of prejudice is not the motive of the one who introduces the testimony; rather it is the effect of such testimony upon the jury.'" *Id. (quoting United States v. Ailstock, 546 F.2d 1285, 1290 (6th*

Cir. 1976). Once hyper-prejudicial evidence about prior heinous acts "inadvertently reaches the attention of the jury, it is most difficuly, if not impossible, to assume contined integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk." *Government of the Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976)*.

With such hyper-prejudicial testimony in this case, it is difficult to believe that a curative instruction to the jury might right the wrong. Some testimony is simply too hotly prejudicial to be cured by the judge's cool voice of reason. As the Supreme Court in *Bruton v. United States, 391 U.S. 123, 135 (1968)*, noted, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *See also Krulewitch v. United States, 336 U.S. 440, 453 (1949)* (Jackson, J., concurring) ("[T]he naive assumption that prejudicial effects can

be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.").

Thus have many courts reversed a conviction on the basis of certain prejudicial testimony in spite of a curative instruction. See, *e.g. Gibson, supra; Smith, 403 F.2d at 77; Toto, 529 F.2d at 284; United States v. Carney, 461 F.2d 465, 466-68 (3d Cir. 1972)* (reversal required, despite curative instruction, where government witness, in responding to question regarding why he disliked defendant, replied that defendant had "tried to kill [him] and [his] two children"); *cf., United States v. Wells, 431 F.2d 432, 433 (6th Cir.)* ("[I]f the evidence is of such an exceptionally prejudicial character that its withdrawal from the consideration of the jury cannot remove the harmful effect caused by its admission, a new trial will be granted."), cert. denied, 400 U.S. 967 (1970).

In this case, a prompt admonition to the jury would not have cured the diseased trial. In the words of the poet:

> The Moving Finger writes; and having writ,
> Moves on: nor all your Piety nor Wit,

Shall lure it back to cancel half a line,
Nor all your Tears wash out a Word of it.

Rubaiyat, Stanza 71. *See Odom v. United States, 377 F.2d 853, 860 (5th cir. 1967).*

Even if, in this case, a curative instruction might have helped, none was given. The fact that counsel for Ellington did not request such an instruction does not absolve the trial judge of the responsibility for giving one, *sua sponte*. In *United States v. Ortiz, 507 F.2d 1224 (6th Cir. 1974)*, this court reviewed a situation where a witness, in unsolicited fashion, testified to an arrest of the defendant that did not result in conviction. It was held that "[t]he fact that [defendant's] trial counsel did not object or move to strike does not serve to waive this sort of error, nor does it excuse the failure of the judge to intervene and strike the offending testimony and instruct the jury to disregard it." *Id. at 1226. See also Ailstock, 546 F.2d at 1291* ("[W]e do not find that the failure of [defendants'] counsel to request a cautionary instruction [with regard to testimony that defendant had been in

prison twice before] excused the District Court from its duty to give such an instruction." -- the conviction was reversed.)

In summary, it was plain error for the district court to deny Ellington's motion for mistrial and he was entitled to a new trial.

II.

For the foregoing reasons, we **affirm** Range's conviction but **vacate** his sentence and **remand** that cause to the district court for further proceedings consistent with this opinion. Furthermore, Ellington's conviction is **reversed**, and the government's case against him is **remanded** to the district court for a new trial.